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Senate Actions Affecting Intelligence

The Senate Select Committee on Intelligence has responded to President Carter's appeal in his State of the Union address for "quick passage" of national security legislation. Members of the Committee met with the President on January 29, 1980 to discuss the omnibus charter legislation affecting all intelligence agencies, including the CIA, FBI, and the National Security Agency.

Senator Daniel Moynihan (D-N.Y.) and six other senators introduced S.2216, The Intelligence Reform Act of 1980, on January 24, 1980, to protect the names of agents, to exempt the intelligence agencies from the Freedom of Information Act, and to reduce the covert action reporting requirement of the Hughes-Ryan Amendment from 8 to 2 committees of Congress.

Senators Walter Huddleston (D-Kan.) and Charles Mathias (R-Md.) held a joint news conference on February 8 to introduce their proposed CIA Charter legislation. The bill is co-sponsored by Senators Bayh and Goldwater. The comprehensive legislation contains authorization for intelligence activities (Title I), standards for intelligence activities (Title II), a structure for the intelligence community (Title III), specific provisions for the CIA, FBI, and NSA (Titles IV, V and VI), protection of agent identities (Title VII), and provisions for physical searches within the U.S. (Title VIII). The administration has not accepted the bill's provisions requiring prior notice to Congress of covert activities or Congressional right to intelligence information. According to Senator Huddleston, hearings will begin on this and related legislation on February 21, 1980.

The Senate Intelligence Committee held a closed hearing on February 6 to discuss pending legislation. Hearings were held February 7 on S.1482, the graymail legislation, by the Senate Judiciary Committee's Criminal Justice Subcommittee. It is also reported that the Senate Judiciary will conclude hearings on S.1612, the FBI Charter, with final testimony from Attorney General Civiletti in March.

House Actions Affecting Intelligence

On January 24, 1980, Rep. McClory (R-Ill.) introduced H.R.6293, legislation similar to Senator Moynihan's bill. (See above for its provisions.)

On January 29, the House Intelligence Committee, Subcommittee on Legislation, marked up H.R.4736, the graymail legislation on handling intelligence information in criminal trials. The Subcommittee also held hearings on H.R.5615, the names of agents bill, on January 30 and 31, 1980. Rep. Wright (D-Texas), House Majority Leader, appeared at the hearings to convey administration and his own support for the bill. (A summary of the testimony is included in this newsletter.)

On February 7, hearings were held on H.R.5030, the FBI Charter legislation, by the Civil Rights Subcommittee, House Judiciary. The House Intelligence Committee's Oversight Subcommittee also held closed hearings on February 7 and 8 on estimates of Soviet strategic forces.

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The Pendulum Swings

Raymond J. Waldmann

In the last forty-five days there has been a remarkable shift in opinion in Washington with respect to intelligence activities. Given the President's new awareness of the Soviet threat and the twin crises of Iran and Afghanistan, there is now a climate of support for the intelligence community. This attitude has encouraged those who would strengthen the capabilities of the intelligence community and limit the imposition of crippling restrictions through a new charter for the CIA.

It is interesting to trace the shift in opinion. At the time of the Standing Committee's intelligence conference in Washington on December 11th and 12th, there appeared to be little interest in Congress for a CIA charter of any type. Various specific bills were stalled in Committee. In an article on December 15th headlined "Administration Drops Push for CIA Charter Before Election," George Lardner of *The Washington Post* said:

Shelving a major pledge of the 1976 campaign, the Carter Administration has abandoned any intention of obtaining a legislative charter before next year's elections. Administration officials... concede there is no chance of winning enactment until 1981 at the earliest.

Given the fate of the Senate's previous effort to legislate a CIA charter, S.2525, and the year's delay in the introduction of a substitute, the forecast was an accurate one.

Within a few weeks, however, the situation had changed dramatically. In his State of the Union message on January 23rd, President Carter made it clear that the administration would seize upon CIA charter legislation, not only as a restrictive document to limit old abuses, but also as a vehicle for showing support of the intelligence community. President Carter stated:

We also need quick passage of a new charter to define clearly the legal authority and accountability of our intelligence agencies. While guaranteeing that abuses will not occur, we need to remove unwarranted restraints on our ability to collect intelligence and to tighten our control on sensitive intelligence information. An effective intelligence capability is vital to our nation's security.

The next day, January 24th, Senator Huddleston said the Senate Intelligence Committee and the administration are close to agreement on the proposed charter. The Senate Committee/Administration bill is said to allow, among other things, intrusive investigations under court orders, using the panel created by the Foreign Intelligence Surveillance Act. It would also protect agent identities and limit Hughes-Ryan reporting. Sen.

Huddleston expected the new legislation to be introduced in February and to move to mark-up after a quick round of hearings. Also on January 24th, Senator Moynihan and Representative McClory introduced their own versions of the CIA charter legislation. Since their bills were much less restrictive than either S.2525 or the likely administration proposal, it was clear that a "charter" bill could include almost anything, and almost anyone could support "a charter."

On January 26th, Senate majority leader Robert C. Byrd (D-W. Va.) stated his support for proposals to "remove unreasonable restraints" on the CIA, indicating he expected Congressional action this year. In his column on January 27th, Joseph Kraft commented on the Carter initiative as follows:

The President asserts a need to strengthen the Central Intelligence Agency as an instrument of American political influence. But he calls on Congress to enact a new CIA charter—a sure way to drown efficient operation in an orgy of Congressional debate on such big-think subjects as accountability."

On February 4th, the Associated Press reported that "President Carter plans to propose, possibly as early as Friday (February 8th) a comprehensive charter to govern a wide range of activities by U.S. intelligence agencies. . . ." This rush to introduce legislation could be seen as serving at least two purposes. First, it redeems an outstanding 1976 campaign pledge. In an election year, this is an important consideration.

Second, and more important, it demonstrates the administration's attention to the intelligence area in a time of crisis. Whether this attention will lead to benign or malignant results in the long run remains to be seen. While early indications point to a charter that would strengthen the intelligence community, one will have to examine the fine print. In this area in particular, the choice of a word or phrase can mean a significant swing of the pendulum in one direction or the other.

ABA Actions on FBI Charter and Graymail Legislation

The Mid-Year meeting of the American Bar Association took place on Monday and Tuesday, February 4th and 5th. After an hour and a half of debate led by Chairman Leibman and Committee Consultants Antonin Scalia and Earl Silbert, the House of Delegates adopted recommendations relating to the FBI Charter and Graymail legislation. In both cases virtually all of the recommendations of the Standing Committee on

Law and National Security to the House were adopted.

FBI Charter Legislation

As reported in the January newsletter, the Standing Committee had six positive proposals. Five of these were adopted by the ABA as proposed. The sixth (Recommendation Number 5 dealing with dissemination of information) was adopted in substance but with slight alteration in wording.

The language of the ABA recommendations dealing with the area of national security adopted by the House of Delegates is as follows:

RESOLVED, that the American Bar Association urges the following changes in S.1612/H.R. 5030, legislation to establish a statutory charter for the Federal Bureau of Investigation:

1. The bill should make clear that activity constituting exercise of a federal constitutional or statutory right may not be the *object* of investigation; but where such activity in fact provides reasonable indication of criminal activity, it should not be excluded as a *basis* for investigating such criminal activity.
2. The FBI's authority to investigate patterns of terrorist activity in violation of state criminal law should be clarified or broadened to include terrorism directed at (a) intimidating or coercing the civil population, (b) influencing or retaliating against the policies or actions of international organizations, or (c) influencing or retaliating against the trade or economic policies of entities engaged in foreign commerce.
3. It should be made clear that the limited authority to investigate organizations as such does not restrict the general authority to investigate an individual on the basis of facts or circumstances reasonably indicating that such individual has engaged, is engaged, or will engage in a violation of federal criminal law.
4. It should be made clear that investigation of foreign terrorist organizations may be conducted pursuant to the FBI's foreign counterintelligence and foreign intelligence responsibilities.
5. The Charter should make explicitly clear that it constitutes the sole authority for dissemination of information by the FBI, and such authority should include provision to disseminate information in furtherance of the Bureau's substantive responsibilities. All dissemination of information should be subject to the restrictions and the sanctions of the Privacy Act.
6. In addition to responsibility for background investigations pertaining to specifically enumerated

federal positions, the FBI should retain authority to conduct other background investigations of persons who have applied for, or are occupying, positions requiring access to classified information, upon certification of such requirement by the responsible federal official, consent by the person in question, and a finding by the Attorney General or his designee that such investigation is an appropriate use of FBI resources.

The Standing Committee's objections to five recommendations of the Section of Criminal Justice were also contained in the January newsletter. By adopting the Standing Committee's first and fifth recommendations, the House of Delegates agreed with our opposition to the Section of Criminal Justice's first and sixth recommendations dealing with the basis for investigation and with information dissemination. The House agreed with the Standing Committee and explicitly rejected the Section's eleventh recommendation dealing with disclosure of the identity of confidential informants in court.

With respect to the Committee's fourth objection, compromise language was agreed with the Section of Criminal Justice to alter their recommendation as follows:

12. A civil cause of action exclusively against the United States should be available to redress serious abuses of investigative authority. Further discussion is necessary to assess the appropriate scope of that cause of action and the extent, if any, to which it should be tied explicitly to the provisions of the FBI Charter. Such causes of action should be consistent with the procedures set forth in the amendments to the Federal Tort Claims Act now before Congress in S.695 as approved in principle by the ABA Board of Governors January 1979.

With respect to the Committee's fifth objection, the Section of Criminal Justice agreed to drop its proposal that the FBI Charter bar federal law enforcement agencies from engaging in various specified activities.

Graymail Legislation

Prior to the Mid-Year Meeting, Professor William Greenhalgh and Laurie Robinson of the Criminal Justice Section met with Earl Silbert, consultant to the Standing Committee, to attempt to reduce the differences between the two. The result was a draft joint proposal which incorporated all the major recommendations of the Standing Committee on Law and National Security. This joint draft proposal was subsequently approved by both the Committee and the Criminal Justice Section. It was then submitted to the

House of Delegates which accepted it completely except for, by motion on the floor, permitting the defendant as well as the United States to have the right of interlocutory appeal from an adverse ruling by the trial judge. This change did not have the support of either the Standing Committee or the Criminal Justice Section nor is it contained in any of the various legislative proposals pending before the Congress.

The language of the ABA recommendations adopted by the House of Delegates is as follows:

RESOLVED, that the American Bar Association supports enactment of "graymail" legislation which will appropriately accommodate and balance the need of the government to avoid unwarranted disclosure of national security information in criminal investigations and trials and the need to assure the accused in criminal cases their right to fair trial. To accomplish these objectives, the American Bar Association recommends:

1. That Congress amend either the Federal Rules of Criminal Procedure or the Federal Rules of Evidence to incorporate the proposed legislative changes;
2. That in cases involving classified information, a mandatory pre-trial conference be ordered by the court on motion of either the prosecution or defense;
3. That the mandatory pre-trial conference be held *in camera* at the request of the government to avoid unwarranted disclosure of classified information;
4. That after reviewing (1) the *ex parte* submission by the prosecution of classified information, or (2) the classified information which the defense proposes to disclose, and after both the prosecution and defense have had an opportunity to be heard, the court may order that,
 - (a) all of the classified information be disclosed to the defense and/or be available for use at trial or other proceedings; or
 - (b) only portions of the classified information be so disclosed and/or available; or
 - (c) only summaries of some or all of the classified information be so disclosed and/or available; or
 - (d) none of the classified information be so disclosed and/or available; or
 - (e) the prosecution may proffer a statement admitting for purposes of the proceedings or trial any relevant facts such classified information would tend to prove, provided that the court must proceed pursuant to sub-

section (a) above if it finds that, with use of the other alternatives, disclosure of the classified information would remain relevant and material to an element of the criminal offense, to a legally cognizable defense, or to the credibility, bias, or interest of any witness;

5. That all classified information not disclosed to an accused be placed under seal of the court and be secured and maintained for appeal;
6. That 18 U.S.C. § 3731 be amended to provide for interlocutory appeal by the United States and the defendant before or during trial from an order of the trial court in a criminal case requiring the disclosure of classified information, imposing sanctions for nondisclosure of classified information or refusing a protective order to prevent the disclosure of classified information, provided that provision be made for expeditious resolution of any such appeal and the provisions of Section 3731 on pre-trial release be followed;
7. That the Attorney General, Deputy Attorney General, or a designated Assistant Attorney General be required to make to the court the initial invocation of these classified information procedures;
8. That provisions in pending graymail legislation amending the Jencks Act (18 U.S.C. § 3500) be opposed as presently drafted; but that if alternative amendments are proposed, that they appropriately accommodate and balance the need of the government to avoid unwarranted disclosure of national security information and the need to assure the accused in criminal cases their right to a fair trial.
9. That if as a result of the procedures adopted in the graymail legislation the defense is required to disclose information it would not otherwise be required to disclose under the Federal Rules of Criminal Procedure, then the government shall be required to disclose to the defense that information it will rely on to rebut what the defense has disclosed, (thus providing that if the defense is required to reveal the identity of its witnesses who will disclose the particular classified information at issue, the government will disclose the witnesses it will call in rebuttal); and that in light of this, inclusion of a "bill of particulars" provision in the "graymail" legislation is unnecessary.
10. That provisions in pending "graymail" legislation should be opposed which would impose on the Department of Justice automatic, detailed report-

ing requirements to the Congress whenever a decision is made not to prosecute a person because of the possibility that classified information will be revealed.

Mr. Silbert's report has on request been submitted to the House Intelligence Committee and to the Criminal Justice Subcommittee, Senate Judiciary. In addition, Mr. Silbert testified before the latter committee on February 7, 1980 in a panel with Professor Greenhalgh from the Criminal Justice Section. They made an unofficial report to the Committee of the action taken by the ABA House of Delegates.

House Actions

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The House Foreign Affairs Committee's International Security Subcommittee scheduled hearings for February 8, 11 and 20 on the role of intelligence in the foreign policy process. Witnesses expected to appear in executive session include representatives from the State Department's Bureau of Intelligence and Research, the Defense Intelligence Agency, the Central Intelligence Agency, and Congress. Issues to be addressed are the intelligence process and product, long term planning and goals, crisis management, and the role of Congress.

On February 12, the Program and Budget Subcommittee, House Intelligence, Chairman Burlison (D-Mo.), planned to meet in executive session with Stansfield Turner, Director, CIA. Hearings are also scheduled for February with dates yet to be announced on: H.R.4736, the graymail legislation, by the Civil Rights Subcommittee, House Judiciary; H.R.5885, the senior cryptologic executive act (merit pay and cash award system) by the House Intelligence Committee; and Freedom of Information and the FBI by the House Government Operations Committee's Government Information Subcommittee.

Congressional Calendar

Feb. 6	Senate Intelligence	Pending Legislation
Feb. 7	Senate Judiciary, Criminal Justice Subcom.	Graymail
	House Judiciary, Civil Rights Subcom.	FBI Charter
	House Intelligence Oversight Subcom.	Soviet Strength Estimates
Feb. 8	House Intelligence, Oversight Subcom.	Soviet Strength Estimates
Feb. 11	House Foreign Affairs, Internat'l. Policy Subcom.	Intelligence and Foreign Policy
Feb. 12	House Intelligence, Program & Budget Subcom.	Intelligence Budget Overview
	House Intelligence	Graymail Markup
Feb. 20	House Intelligence, Oversight Subcom.	Soviet Strength Estimates
	House Foreign Affairs, Internat'l. Policy Subcom.	Intelligence and Foreign Policy
	House Government Operations, Gov't. Information Subcom.	Freedom of Information
Feb. 21	Senate Intelligence	CIA Charter
	House Intelligence, Oversight Subcom.	Soviet Strength Estimates
Feb. 26	House Judiciary, Civil Rights Subcom.	FBI Authorization FY81
To Be Announced	Senate Judiciary	FBI Charter
	House Intelligence	Senior Cryptographers Pay
	House Intelligence, Oversight Subcom.	Soviet Forgeries
	House Judiciary, Civil Rights Subcom.	Graymail

House Hearings on The Names of Agents Bill

January 30, 1980

The Subcommittee opened hearings on H.R. 5615, concerning the unauthorized disclosure of intelligence agent identities, Rep. Jim Wright (D-Texas), Majority Leader in the House, was present to endorse the bill, which had been introduced on October 17, 1979 by Edward P. Boland (D-Mass.), Chairman of the full Committee with the cosponsorship of all members of the Committee. Mr. Wright confirmed the administration's support of the bill. He advised the Committee that the president favors limiting, to perhaps even only one, the number of committees to which intelligence activities must be reported. He reiterated the priority being given to intelligence concerns by the majority leaders of the new Congress.

Mr. Frank Carlucci, Deputy Director, CIA, accompanied by Daniel Silver, General Counsel, and Frederick Hitz, Legislative Counsel, read a prepared statement emphasizing the fact that nothing has been more damaging to the morale of the agency than the disclosure of the identity of its agent. When questioned by Mr. Fowler (D-Ga.) as to the type of legislation the agency would like to see the Committee pass, Director Carlucci advised that the agency would like legislation pinpointing those who have disclosed the names of agents when efforts have been made by the government to conceal such information. He added that proof of "intent" to impair or impede the intelligence capabilities of the U.S. must be demonstrated. He stated that journalists reporting from unclassified sources should only be liable under the statute if they "embark upon a crusade" to destroy the intelligence of the country. Mr. McClory (R-Ill.) suggested the need to include persons other than CIA agents under protection of the bill, such as FBI agents or private businessmen reporting to the agency. Director Carlucci had no objection to including either group. Mr. Boland was concerned with the provision making use of public sources a criminal offense. Director Carlucci agreed this was a fuzzy issue, but emphasized that when the government is taking affirmative steps to conceal such information and there is specific intent to impede or impair the intelligence activities of the U.S., then criminal prosecution is justified.

In his prepared testimony, Robert L. Keuch, Associate Deputy Attorney General, raised objections to the drafted bill, warning that it would have a "chilling effect" on freedom of speech. He introduced a Department of Justice-drafted bill, which would address the same issues as H.R. 5615, yet avoid "some areas of

controversy." The major difference lies in section 801 of the DOJ bill, which goes beyond the Committee's bill by stating the law is violated only in those cases where the identity of a covert agent is "classified." Mr. Keuch admitted that inability to reach administration accord on different aspects had delayed the DOJ input. Mr. McClory suggested that perhaps administration pressure had suddenly changed the position of the Justice Department. Mr. Fowler raised the issue of motive in disclosure. Mr. Keuch said Justice is concerned with proof that a journalist "knowingly" discloses classified information; he also said that the definition of "covert agent" is important. Mr. Fowler stated that he detected a hesitation on the part of the Justice Department from prosecuting journalists, and asked whether the legislation, if enacted, would be utilized by DOJ. Mr. Keuch assured him that it would, emphasizing "no segment of society is above the law."

Mr. Floyd Abrams (a New York attorney who had represented *The New York Times* in the Pentagon Papers Case) ended the morning session with a plea for a recognition of the requirements of the Constitution and most especially, the First Amendment. He warned that the legislation as drafted is unconstitutional, contains serious flaws, and is too broad. He advised that it is imperative for constitutional reasons that the statute be limited in some fashion so as to make criminal only the disclosure of the identity of the agent, not the publication or further dissemination of that identity.

Speaking on behalf of the Association of Foreign Intelligence Officers, Mr. John Blake noted that the need for this legislation is clear and compelling. Against the backdrop of the Phillip Agee disclosures and those of *Counterspy* and *Covert Action* Magazines, he urged the further protection of national security sources. He said any newsworthy story can be developed without the divulging of names of agents, and the difference between "liberty" and "license" should be made clear when national security is at stake.

Jerry J. Berman, Morton H. Halperin and John Shattuck presented the ACLU position which focused on the point that this bill has been expanded far beyond its original purpose of protecting CIA operatives from public disclosure. They advised that criminal penalties should apply only to those in government and not be extended to encompass the press. The ACLU panel urged Congress to enact instead comprehensive charter legislation setting forth what the intelligence agencies can and cannot do. Mr. Halperin stated that it is the "obligation of the executive to keep secret that which must be kept secret." Mr. Berman added that the espionage laws should be revised to protect the government's secrets, that this is the responsibility of the

government and not the press, and that the issue of surveillance should be legislated. When asked about the naming of names, Mr. Halperin said that, absent some very specific national security instances, the protection of First Amendment rights is more important, including the right to criticize the government. Mr. McClory stated that it is the right of Congress to legislate a criminal code for abuses by individuals of this right when national security is involved. Mr. Berman concluded that the debate would better be, "What is national security today?" for Congress cannot make secret and punishable that which is public information.

Mr. Ford Rowan, formerly with NBC, questioned the effectiveness of the proposed legislation in practice, and recommended instead that internal government protections for intelligence agencies be strengthened. He reiterated that the First Amendment protects the freedom of the press, that these guarantees must not be tampered with, and that in his view the proposed bill is unconstitutional.

M. Stanton Evans, a columnist and commentator with CBS, in contrast to Mr. Rowan, urged the passage of the bill, concluding there is no inconsistency between its objectives and freedom of the press. He advised that he found the government's need to prove intent to impede or impair foreign intelligence activities of the U.S. to be a "sensible precaution."

January 31, 1980

The first witness, Mr. William H. Schaap, publisher, *Covert Action Information Bulletin*, accompanied by Ellen Ray and Louis Wolf, stated bluntly that the philosophy of his group calls for the abolition of the CIA as anything other than an intelligence gathering organization. He went on that since they believe the CIA is beyond reform, it should be completely abolished. He accused the CIA of being an "evil manipulative instrumentality" interfering in the affairs of other countries. Under questioning, he defined this interference as paying off foreign politicians, assassinating foreign officials, and buying off foreign governments. When questioned about the disclosure of names of agents in *Covert Action*, he stated that he did not believe such disclosure had caused harm or harassment or had even imperiled the lives of any CIA agents overseas. He took issue with *The Washington Post's* recent coverage of the Americans helped to escape from Iran by the Canadians, accusing it of being less sensitive to imperiling people's lives. Questions where they draw the line in exposing secrets, he stated "we publish investi-

gative pieces and political analyses." He stated that when naming names they were curtailing the activities of agents gaining the confidence of influential people in other countries by pretending to be what they are not. He went on to say that while only two pages of his magazine deals with naming names, that is the issue being emphasized. Finally, asked by Mr. Boland his rate of accuracy in naming names, he said 100% and that if any printed were incorrect, he would print a retraction in bold type.

Mr. William E. Colby, former Director of the CIA, called for immediate passage of the drafted legislation, which he confirmed is urgently needed in order for intelligence gathering to go forward. He recommended extending the protection to American citizens to protect sources in the private arena. Asked by Mr. Boland whether this bill should be included as part of the charter legislation, he stated firmly that this separate bill should be passed as soon as possible to send a message to the world. He said this legislation is an example of the selection of the practical as opposed to the ideal, but "let's get this done." Section two of the bill will only apply in very few cases, but journalists who intentionally set out to destroy the intelligence capabilities of the U.S. must account for their actions. In discussing the death of Richard Welch, the CIA station chief in Athens, Mr. Colby cited four causes: the degree of sensationalism about the CIA in the press at the time, the focus of attention on individual CIA officers, the actual naming of the agent in the press, and the weakness in the cover situation by the CIA. He said that CIA cover in U.S. embassies is "terrible", blaming Congressional pressure preventing the CIA from using official cover from the State Department, AID, Peace Corps, etc. He said he would have liked to have seen a new charter a year ago to let the world see an American consensus of what intelligence should be today, and urged passage of this bill as well as one repealing the Hughes-Ryan Amendment.

Senator Lloyd M. Bentsen (D-Texas) submitted written testimony for the record, but did not appear. He urged passage of the legislation he had introduced in 1975 to protect CIA officers from exposure. He also urged changes in the Hughes-Ryan Act to reduce from eight to two the number of congressional committees having access to secret intelligence information. He pointed out that only 29 members of Congress would be involved if the Senate and House Intelligence Committees were the sole committees advised of such covert actions.

Suggestions for Further Study from December Conference Participants

1. Legislation on unauthorized disclosure
2. FOIA Amendments
3. Impact of proposed (charter) legislation on CIA agents
4. Ways to expand education on intelligence and national security at universities and law schools
5. Prevention of 1970's abuses by charters
6. Legal definition of "national security"
7. Need for warrant or warrant-free surveillance of U.S. persons abroad
8. Appropriateness of "criminal standard" in authorizing intelligence activities
9. Good bibliography of intelligence publications
10. Need to expand "reach" of intelligence to gather public support
11. Need for information on potential adversaries in the media
12. Review of Communist intelligence activities in U.S.
13. Methods of classification used by government agencies
14. Intelligence in support of economic diplomacy
15. Impact of intelligence charter on relations with allies
16. Impact of charters on improvement of collection of information
17. Erosion of U.S. intelligence capabilities, both domestic and foreign, and how the trend can be reversed

2. The Court must give substantial weight to affidavits from the Agency in this review.
3. The Court should require the Agency to create as full a record as possible including the nature of the documents and the justification for nondisclosure.
4. If step three creates a sufficient basis for a decision, the Court may accept classified affidavits *in camera* or may inspect the documents *in camera*.
5. The Court should require the release of reasonably segregable parts of documents that do not fall with the FOIA exemptions.

The District Court found that *in camera* review of Agency affidavits was appropriate and that public itemization and detailed justification would compromise legitimate secrecy interests. Based on this review, the Court created as complete a record as is possible and accepted sensitive affidavits *in camera*. By providing for *in camera* review, Congress acknowledged that judges must sometimes make decisions "without full benefit of adversary comment on a complete public record." (Opinion, page 7) The Circuit Court also agreed with the District Court's exclusion of the appellant's counsel from the review.

With respect to Exemption 1 of the FOIA, the Court found that the District Court correctly applied the standards of Executive Orders 10501 and 11652. The Agency's public affidavits described the activity involved, the need for maintaining secrecy, and the reason for believing that disclosure of any of the requested material could compromise legitimate secrecy needs. The *in-camera* affidavits spelled out the same factors with greater specificity.

With respect to Exemption 3, the Court found that Public Law 86-36 (the NSA statute) meets the requirements of a statute which specifically exempts material from disclosure. Moreover, the Court found that this statute is broader than the statute concerning the Central Intelligence Agency since that latter statute deals only with "intelligence sources and methods." Public Law 86-36 on the other hand protects not only organizational matters but also "any information with respect to the activities" of the NSA. The Circuit Court found that Congress had rational grounds to enact for the NSA a protective statute broader than the CIA's.

This decision makes clear that the NSA continues to enjoy, because of its Congressional protective statute and because of the nature of its activities, greater protection than intelligence agencies generally. The decision further affirms the willingness of courts to address sensitive national security issues *in camera*, on the basis of Agency affidavits which themselves are not made public. The public record in such cases may be scanty, and relate only to procedural compliance and the appropriateness of the hearing court's exercise of discretion.

Court Decisions—Hayden v. NSA

The United States Court of Appeals for the District of Columbia Circuit has upheld a District Court Ruling that materials in the possession of the National Security Agency are exempt from disclosure under both the Freedom of Information Exemption 1 and Exemption 3. In *Hayden v. National Security Agency*, 29 October 1979, the Court upheld NSA's refusal to release material in its possession obtained through the Agency's monitoring of foreign electromagnetic signals. The material sought referred to Jane Fonda and Thomas Hayden.

The Circuit Court found that the District Court had followed the procedural standards developed in *Ray v. Turner* 587 F.2d 1187 (D.C. Cir. 1978) and *Vaughn v. Rosen* 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974):

1. The trial court must make a *de novo* review of the Agency's classification decision, with the burden on the Agency to justify nondisclosure.